JOHN W. RICE

IBLA 73-34 Decided May 24, 1973

Appeal from decision (I-751) by Idaho State Office, Bureau of Land Management, rejecting application to purchase land pursuant to the Mining Claims Occupancy Act.

Set aside and remanded.

Mining Occupancy Act: Generally--Mining Occupancy Act: Qualified Applicant

The rejection of an application under the Mining Claims Occupancy Act, as a matter of law, because the applicant is not residing on the claim at the time of the application is erroneous where the applicant, with his wife, could have qualified as occupant-owners of residential improvements on an unpatented mining claim on October 23, 1962, as required by the Act, and thereafter the wife dies and the husband is forced to leave the claim for health reasons prior to making the application. His qualified status in his own right or as successor to the interest of his spouse, who was also qualified on October 23, 1962, is not lost because of such absence thereafter.

Mining Occupancy Act: Generally

The consent of the Forest Service, United States Department of Agriculture, is a prerequisite to any favorable action by the Department of the Interior upon an application filed under the Mining Claims Occupancy Act for lands within a national forest. Before rejecting an application because of any lack of consent by the Forest Service, the application should be suspended until the applicant has been given notice of the Forest Service's refusal to give consent and afforded an opportunity to pursue his administrative remedies before that agency.

APPEARANCES: Clifford E. Sanders, Esq., Kingsport, Tennessee, for appellant.

OPINION BY MRS. THOMPSON

John W. Rice has appealed from a decision of the Idaho State Office, Bureau of Land Management, dated May 25, 1972, which rejected his application (I-751) for a patent to a five-acre tract within the Little Nugget No. 1 placer mining claim in unsurveyed sec. 6, T. 12 N., R. 15 E., B.M., Idaho, within the Challis National Forest. This application was filed on July 17, 1970, pursuant to the Mining Claims Occupancy Act of October 23, 1962, as amended, 30 U.S.C. §§ 701-09 (1970).

The mining claim was relinquished by Rice January 27, 1971.

Based upon a report by examiners of the Forest Service, United States Department of Agriculture, the State Office found that Rice was a qualified applicant under the Mining Claims Occupancy Act because:

> * * * [He] and his predecessors in interest were the owners of the improvements on the claim during the period beginning July 23, 1955, and that his ownership and occupancy continued through October 23, 1962, with the improvements being used as a principal place of residence.

Despite finding that Rice was a qualified applicant, the State Office ruled that the Secretary of the Interior has no authority under the Act to convey an interest to someone who is no longer an occupant. It stated the report by Forest Service personnel reveals Rice had not used the improvements on the claim as a principal place of residence since 1968, use being made only on weekends and vacations by his relatives and friends.

Rice contends that the rejection of his application was arbitrary, unfair, and unjust, and based on inaccurate reasons. Specifically, he claims that the reason he has not lived regularly on the claim since 1968 was his wife's death and his own poor health which has forced him to reside where he "would have immediate access to hospitalization and medical care." (The record indicates his present residential address is in Southern California.) It is unnecessary to discuss other contentions made by appellant in view of the result we reach in this case.

The real issue raised by this appeal is whether the State Office was correct in ruling as a matter of law that the Mining Claims Occupancy Act does not authorize relief to someone who meets the criteria of a qualified applicant as defined in section 2 of the Act, (30 U.S.C. § 702 (1970) quoted infra) where at the time of the application he may be residing elsewhere because of health reasons. In other words, is the authorization in section 1 of the Act to the Secretary of the Interior to convey an interest "to any occupant of an unpatented mining claim" limited to persons who at the time of the application or investigation by Government personnel actually reside on the claim as a principal place of residence? In effect, the State Office has equated continued physical presence of the applicant and actual residence with the word "occupant". It has made the definition of "qualified applicant" prescribed in section two of the Act as a "residential occupant-owner" continue to the time of the application or investigation rather than being determined as of October 23, 1962.

To support this view, it indicates that the purpose of the Act was to provide relief for persons upon whom a hardship would be visited were they to be required to move from their long-established homes as a result of a finding that their mining claims are invalid. It is true that this is the broad objective of the Act, but this does not serve as a basis for interpreting this relief Act in a more restrictive way than the language of the Act clearly expresses. William Rafferty, 77 I.D. 26, 29 (1970).

The word "occupant" as used in statutes does not have a rigidly-fixed meaning, although it usually means a person or his agent in actual possession of land and improvements rather than constructive possession, but is sometimes distinguished in usage with the word "resident". See 29 Words & Phrases, 233 Occupant (1972). A person may be an "occupant" of land by having improvements thereon, although he, himself, may not actually reside upon the land. The Act does not define "occupant," but in section 2 it defines a "qualified applicant" as a

> * * * residential occupant-owner, as of October 23, 1962, of valuable improvements in an unpatented mining claim which constitute for him a principal place of residence and which he and his predecessors in interest were in possession of for not less than seven years prior to July 23, 1962. 30 U.S.C. § 702 (1970).

The regulations echo this definition and add the "heirs or devisees of such a residential occupant-owner." 43 CFR 2550.0-5(a). They define the term "occupant-owner" as referring to

> * * * persons who, on October 23, 1962, claimed title to valuable improvements which they or their predecessors in interest have constructed on an unpatented mining claim even though title to the improvements might ultimately be found to be in the Government. 43 CFR 2550.0-5(b).

Neither the Act nor the regulations provide that the actual physical presence of the applicant upon the claim, as distinguished from his improvements, must continue after the 1962 date unbroken to the date of the application to meet the requirements of the Act. The residency requirement is limited to the seven years prior to July 23, 1962. The case of William Rafferty, supra, suggests circumstances where it is not a requirement after that time. In that case, a qualified residential occupant-owner as of October 23, 1962, died on January 30, 1963, and his wife thereafter moved to a nursing home although retaining the claim as her legal residence for several years until her death. She devised the claim and improvements to her nephews who never lived on the claim. The decision, at page 30, expressly stated that there is nothing in the Act which would preclude the devise by the widow "of all rights and privileges which she had under the act, whether obtained as a residential occupant-owner or as the devisee of a residential occupant-owner, to appellants." In the present case, Rice is claiming both in his own right and apparently as successor to his wife's interest, which she had held prior to their marriage. If his wife was a qualified applicant prior to her death, it would appear that he could succeed to her right without the necessity of actual residence upon the claim after 1962, as was held in William Rafferty, supra. That case suggests also that where a qualified residential occupant-owner for health reasons is required to live off the claim after 1962, this does not affect his right as a qualified applicant under the Act.

We conclude, therefore, that the decision below erred in concluding as a matter of law that there was no authority under the Act to convey an interest to someone who in his own right was a qualified applicant, or was the successor to the interest of his spouse, a qualified applicant as defined in section 2 of the Act, merely because he had to leave the claim after 1962 for health

reasons. This holding does not mean that the absence of the applicant from the claim may not be a reason to reject an application in an exercise of discretion if adverse consequences flow from such absence. The decision below, however, was not predicated on discretionary grounds.

Furthermore, the lands are in a national forest. Pursuant to section 3 of the Act (30 U.S.C. § 703), no conveyance of any interest in lands withdrawn for an agency other than the Department of the Interior may be made without "the consent of the governmental unit concerned and under such terms and conditions as said head may deem necessary." The consent of the Forest Service, therefore, is a prerequisite to any favorable action upon this application. The decision below did not state the application was rejected because of lack of consent of that agency, but the record reveals that the Forest Service examiners recommended against giving consent to appellant's application. It does not appear, however, that notice of a refusal to give consent was given by the Forest Service to appellant. In accordance with a "Memorandum of Understanding" between the Forest Service and the Bureau of Land Management (BLM MANUAL § 2215 (Appendix 1)), the Forest Supervisor is to notify the applicant when consent will not be given. The applicant would then have the right of appeal in accordance with Department of Agriculture regulations.

As it does not appear that notice has yet been given to appellant of any lack of consent, and the opportunity to pursue available administrative remedies before that agency has not yet been afforded to appellant, action on this application shall be suspended for a reasonable time to permit the applicant to seek the consent of the Forest Service. Of course, if such consent to the conveyance of any interest cannot be obtained, the application will have to be rejected for that reason after the appropriate procedures have been followed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is set aside and remanded to the Bureau of Land Management for appropriate action consistent with this decision.

Joan B. Thompson, Member

We concur:

Joseph W. Goss, Member

Frederick Fishman, Member